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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 LOUIS DANIEL SMITH, also known  
11 as Daniel Smith, also known as Daniel  
12 Votino; KARIS DELONG, also known  
as Karis Copper; TAMMY OLSON;  
and CHRIS OLSON,

13 Defendants.

NO: 13-CR-14-RMP-1

14  
15 ORDER DENYING DEFENDANTS'  
16 MOTIONS TO DISMISS

17 Before the Court are Defendants' three Motions to Dismiss, **ECF Nos. 389,**  
18 **390 and 393.**<sup>1</sup> Defendant Louis Daniel Smith, who is appearing in this matter *pro*

19  
20 <sup>1</sup>The titles of those motions are as follows: ECF No. 389 – Motion for Dismissal  
or in the Alternate an Order Compelling Production and Granting a Continuance;  
ECF No. 390 – Verified Report of Felony Violations Pursuant to 18 U.S.C. § 4;  
Professional Misconduct (28 U.S.C. § 530B), Due Process Violations; and Motion  
for Relief; ECF No. 393 – Motion to Dismiss Case or Disqualify Counsel for  
Plaintiff. All three motions request dismissal as well as alternative forms of relief.

1 *se*, filed all three motions.<sup>2</sup> Neither co-defendant Karis DeLong nor co-defendant  
2 Tamara Olson have filed an opt-out notice to the motions and thus are considered  
3 as having joined the motions pursuant to the Pretrial Order in this case. ECF No.  
4 122 at 4.

5 A pretrial conference was held in this matter on October 7, 2014.  
6 Christopher E. Parisi appeared at the conference on behalf of the Government.  
7 Defendant Louis Daniel Smith appeared *pro se*, with standby counsel Terence M.  
8 Ryan also present. Roger J. Peven appeared on behalf of Defendant Karis Delong,  
9 and Nicholas V. Vieth appeared on behalf of Defendant Tammy Olson. The Court  
10 has considered: the motions; the opposition filed by the Government, ECF No.  
11 399; all of Defendants' replies, ECF Nos. 405, 408, and 409; the Affidavit of Brent  
12 Westenfelt of Orange Legal Technologies, ECF No. 418; the Declaration of Tim  
13 McCann, the defense discovery coordinator, ECF No. 417; and the parties'  
14 arguments. The Court is fully informed.

## 15 **BACKGROUND**

16 The facts and procedural history of this matter are set forth in the Court's  
17 order at ECF No. 394, denying Defendants' motion to continue. Therefore, the  
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19 <sup>2</sup> Defendant Smith's motions are liberally construed because he is appearing *pro*  
20 *se*. *See, e.g., United States v. Johnson*, 988 F.2d 941, 943 (9th Cir. 1993).

1 Court does not repeat the facts here except where necessary for the following  
2 analysis.

### 3 DISCUSSION

4 In two of Defendants' motions, Mr. Smith claims violations of his Fifth  
5 Amendment rights. ECF Nos. 389 and 390. In the third motion, Mr. Smith claims  
6 a violation of his Sixth Amendment rights. ECF No. 393.

#### 7 **A. Fifth Amendment Claims**

8 The Fifth Amendment Due Process Clause protects defendants from  
9 prosecutorial misconduct in the pre-indictment stage. *United States v. Simmons*,  
10 536 F.2d 827, 830 n.9 (9th Cir. 1976) (citing *United States v. Marion*, 404 U.S.  
11 307, 320, 324 (1971)). Under Federal Rule of Criminal Procedure 48, a court may  
12 dismiss an indictment pre-trial, *sua sponte*, “if unnecessary delay occurs in: . . . (3)  
13 bringing a defendant to trial.” *Id.*

14 Additionally, the Ninth Circuit has held that a court may dismiss an  
15 indictment with prejudice either because of “outrageous government conduct” that  
16 “amounts to a due process violation,” or “under [the court’s] supervisory powers.”  
17 *United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008). However,  
18 “although courts have the power to dismiss an indictment . . . , the power is  
19 exercised sparingly.” *United States v. Busher*, 817 F.2d 1409, 1411 (9th Cir. 1987)  
20 (citing *United States v. De Rosa*, 783 F.2d 1401, 1404 (9th Cir. 1986); *United*

1 *States v. Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir. 1983)). “[D]ismissing an  
2 indictment with prejudice encroaches on the prosecutor’s charging authority,” and  
3 therefore “this sanction may be permitted only in cases of flagrant prosecutorial  
4 misconduct.” *Chapman*, 524 F.3d at 1085 (quoting *United States v. Simpson*, 927  
5 F.2d 1088, 1091 (9th Cir. 1991)) (internal quotation marks omitted) *abrogated on*  
6 *other grounds by United States v. W.R. Grace*, 526 F.3d 499, 511 n.9 (9th Cir.  
7 2008). Moreover, “[a] court may dismiss an indictment under its supervisory  
8 powers only when the defendant suffers substantial prejudice.” *Chapman*, 524  
9 F.3d at 1087 (quoting *United States v. Jacobs*, 855 F.2d 652, 655 (9th Cir. 1988)).

10 **1. ECF No. 389: Motion to Dismiss or Alternatively Compel Production  
11 and Continue**

12 Mr. Smith alleged in his motion that the Government had failed to turn over  
13 all electronic discovery to Defendants in violation of his Fifth Amendment right to  
14 due process. ECF No. 389 at 6. He contended that dismissal of the indictment was  
15 an appropriate remedy. ECF No. 389 at 6.

16 Prior to the hearing on this matter, Mr. Smith submitted two affidavits in  
17 support of his motion: one from Brent Westenfelt of Orange Legal Technologies,  
18 and one from Tim McCann, the discovery coordinator in this case. ECF Nos. 417  
19 and 418. Mr. Westenfelt stated that Orange Legal Technologies received only one  
20 of five files listed on the Google, Inc. warrant return. ECF No. 418 at 3. The

1 missing files include: “.fsevents;” “.Spotlight-V100;” “.Trashes;” and  
2 “.\_.Trashes.” ECF No. 418 at 3. Mr. Westenfelt also indicated that Orange  
3 Technologies did not receive any e-mails generated from two e-mails addresses:  
4 customercare@projectgreenlife.com and joe@projectgreenlife.com. ECF No. 418  
5 at 3-4.

6 In his affidavit, Mr. McCann stated that the discovery hard drive that the  
7 Government provided to him did not include four of the five files listed on the  
8 Google, Inc. warrant return. ECF No. 417 at 2. In particular, Mr. McCann noted  
9 the missing “.Trashes” folder. ECF No. 417 at 3.

10 Since the hearing on this matter, AUSA Parisi has confirmed that four of the  
11 five files listed on the Google, Inc. warrant return, namely, “.fsevents;”  
12 “.Spotlight-V100;” “.Trashes;” and “.\_.Trashes.”, were in fact inadvertently left off  
13 the discovery hard drive disclosed to Defendants. ECF No. 430 at 3-4. AUSA  
14 Parisi assures this Court that the mistake was simply a computer error that was  
15 unintentional. ECF No. 430 at 3-4.

16 Moreover, the Government recently filed an Affidavit by Alexandra  
17 McCombs, the Lead Project Manager for Labat-Anderson Incorporated, the  
18 Government’s electronic discovery contractor. ECF No. 443. In that affidavit, Ms.  
19 McCombs declares under penalty of perjury that the four missing folders “do not  
20 contain any e-mails . . . they contain only system files and other data which is

1 unrelated to the e-mail files.” ECF No. 443 at 4. Ms. McCombs further states that  
2 the metadata associated with the “.mbox” files contained within these four folders  
3 “does not contain information which would show whether an email was opened,  
4 how long it might have been open, or whether a particular person reviewed an  
5 email.” ECF No. 443 at 4.

6 Nevertheless, Mr. Smith contends that the Government’s initial failure to  
7 provide these missing files warrant dismissal of this case. ECF No. 389. Mr.  
8 Smith cites *United States v. Chapman* in support of his request that this Court  
9 dismiss the indictment with prejudice. ECF No. 389 at 4-6. However, *Chapman*  
10 requires the presence of “flagrant prosecutorial misconduct.” *Chapman*, 524 F.3d  
11 at 1085 (citing *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991)  
12 *abrogated on other grounds by W.R. Grace*, 526 F.3d at 511 n.9). In *Chapman*,  
13 the court found flagrant prosecutorial misconduct where the government failed to  
14 produce material required by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v.*  
15 *United States*, 405 U.S. 150 (1972). *Chapman*, 524 F.3d at 1085. The government  
16 also failed to keep a log of what the government already had disclosed, and  
17 “repeatedly represented to the court that he had fully complied with *Brady* and  
18 *Giglio*, when he knew full well that he could not verify these claims.” *Id.*

19 There is no evidence that AUSA Parisi has intentionally failed to produce  
20 material required by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United*

1 *States*, 405 U.S. 150 (1972), and thus engaged in “flagrant prosecutorial  
2 misconduct.” *Chapman*, 524 F.3d at 1085. The Government has limited discovery  
3 obligations. Under Federal Rule of Criminal Procedure 16, the Government must  
4 disclose any oral or written statements made by Defendant, Defendant’s prior  
5 record, any items that are “material to preparing the defense,” items that the  
6 government intends to use in its case-in-chief, and items that were obtained from  
7 or belong to the defendant.” Fed. R. Crim. Pro. 16. Under *Brady*, the  
8 Government’s responsibility to provide pre-trial discovery extends only to  
9 potentially exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Mr.  
10 Smith has failed to show that the missing four folders will be used in the  
11 Government’s case-in-chief or have any exculpatory value whatsoever, and Ms.  
12 McComb’s affidavit supports the opposite conclusion. ECF No. 443.

13 Additionally, there is no evidence that AUSA Parisi failed to disclose the  
14 four folders in bad faith. The Ninth Circuit in *Chapman* acknowledged the  
15 difficulty that a defendant faces in attempting to prove that the government  
16 intentionally failed to comply with its discovery obligations. *Chapman*, 524 F.3d  
17 at 1085. Nevertheless, the district court in *Chapman* found that the government  
18 had failed to comply with its discovery obligations, whether intentionally or not,  
19 when the government presented evidence at trial that the defendants asserted had  
20 never been disclosed to them pretrial. *Id.* at 1078-80. When ordered by the Court

1 to provide documentation proving that the evidence had been disclosed pretrial, the  
2 government was unable to do so. *Id.* at 1079, 85.

3 In contrast, the trial in this case has not yet occurred. This Court can only  
4 take the parties at their word. AUSA Parisi assures the Court that the mistake in  
5 discovery production has been remedied and that the remaining four folders have  
6 been disclosed to Defendants. ECF No. 430 at 4. The four folders' lack of  
7 exculpatory value lends credence to the Court's opinion that the Government has  
8 not acted in bad faith by erring in their initial disclosure obligations.

9 Finally, even considering the Government's error in failing to disclose  
10 initially the four files returned by Google, Inc., the Court finds that Mr. Smith has  
11 failed to make any showing that he or the other defendants have suffered  
12 substantial prejudice as a result of the delayed disclosure of the missing folders,  
13 files, and e-mails. See *Chapman*, 524 F.3d at 1087 ("A court may dismiss an  
14 indictment under its supervisory powers only when the defendant suffers  
15 substantial prejudice.") (quoting *United States v. Jacobs*, 855 F.2d 652, 655 (9th  
16 Cir. 1988)).

17 The electronic discovery in this case is complicated, and it would be unfair  
18 for this Court to expect Mr. Smith to know the contents of all the allegedly missing  
19 files. Nevertheless, Mr. Smith is claiming an absence of files that initially  
20 belonged to him: his e-mails taken from his e-mail accounts or computers. Mr.

1 Smith should be able to describe to the Court what exculpatory material is missing,  
2 and how exactly that material will prove exculpatory.

3 When pressed by the Court at the hearing, Mr. Smith stated that some of the  
4 missing e-mails may show that customers contacting Project Green Life (PGL)  
5 were looking to purchase Miracle Mineral Solution (MMS) to sanitize their water  
6 supply, rather than for use as a drug. Mr. Smith argued that this would be  
7 exculpatory. The Court does not find this argument persuasive.

8 The Food, Drug and Cosmetic Act (codified at 21 U.S.C. §§ 301-399d),  
9 under which Defendants were charged, defines “drug” as, among other things,  
10 articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention  
11 of disease in man, 21 U.S.C. § 321(g)(1)(B), articles (other than food) intended to  
12 affect the structure or any function of the body of man, 21 U.S.C. § 321(g)(1)(C),  
13 and articles intended for use as a component of any article specified in clause (A),  
14 (B), or (C), 21 U.S.C. § 321(g)(1)(D). This definition arguably encompasses the  
15 sale of MMS for water purification and sanitization as well as the sale of MMS for  
16 direct human consumption.

17 Without more, there is no evidence that the Government has disregarded its  
18 discovery obligations in bad faith by failing to produce exculpatory material, nor is  
19 there any evidence that Defendants have suffered, or will suffer, “substantial  
20 prejudice.” If the Government introduces evidence at trial that has not been

1 previously disclosed, Mr. Smith may renew his motion. Until that time, Mr.  
2 Smith's motion to dismiss, ECF No. 389, is denied.

3 Alternatively, Mr. Smith asks this Court to require the Government to  
4 produce "a forensic copy of the 32-gigabyte Kingston thumb drive originally  
5 received from Google, Inc. and grant a 180 day continuance from the day the data  
6 is received." ECF No. 389 at 6. As discussed previously, the Government assures  
7 the Court that the remaining four folders have been disclosed to Defendants. ECF  
8 No. 430 at 4. The Court, therefore, treats Mr. Smith's request for repeat discovery  
9 as moot.

10 Finally, Defendant recently requested a continuance on the basis that the  
11 Government had failed to abide by its discovery obligations. ECF No. 365. The  
12 Court properly denied that motion. ECF No. 394. Mr. Smith then sought  
13 reconsideration by this Court, ECF No. 397, and the Court similarly denied that  
14 motion, ECF No. 411. The Court reserves on Mr. Smith's latest motion for a  
15 continuance as an alternative relief until the pretrial conference on November 4,  
16 2014. Therefore, Defendants' motion, ECF No. 389, is denied in part and reserved  
17 in part.

1       **2. ECF No. 390: Motion to Dismiss or Alternatively to Disqualify and to**  
2       **Suppress**

3           Mr. Smith urges this Court to dismiss the indictment in this case because the  
4       Government once represented to this Court that Google, Inc. returned “between 1.8  
5       and 1.9 million files” in response to the search warrant, but the most recent version  
6       of discovery indicates there are only 509,467 files. ECF No. 390 at 1, 4. Mr.  
7       Smith further argues that the Government lied to this Court about the number of  
8       files in order to rebut Mr. Smith’s 2012 motion to return property. ECF No. 390 at  
9       3, 7. Mr. Smith accuses AUSA Parisi of perjury, pursuant to 18 U.S.C. § 1621;  
10       fraud, pursuant to 18 U.S.C. § 371; violation of federal attorney ethical standards,  
11       pursuant to 28 U.S.C. § 530B; and violation of Washington State Rule of  
12       Professional Conduct 3.3. ECF No. 390 at 8-9. Thus, Mr. Smith contends the  
13       indictment in this case was obtained by fraud on the court in violation of his Fifth  
14       Amendment right to due process, and that dismissal of the indictment is an  
15       appropriate remedy.

16           Mr. Smith provides no evidence that the Government’s representations to  
17       this Court regarding the quantity of electronic data were intentionally misleading,  
18       nor is there any evidence that the Government’s conduct amounts to “flagrant  
19       prosecutorial misconduct.” *Chapman*, 524 F.3d at 1085 (quoting *United States v.*  
20       *Simpson*, 927 F.2d 1088, 1091 (9th Cir 1991)) (internal quotation marks omitted)

1 *abrogated on other grounds by W.R. Grace*, 526 F.3d at 511 n.9. AUSA Parisi  
2 explained the discrepancy in the number of data files. *See* ECF No. 296 at 18-19.  
3 Additionally, the Government informed the Court at the hearing that it has no  
4 knowledge of how Orange Technologies is counting files, or how the government  
5 contractor counted files. Agent Borden's testimony before this Court that there  
6 were between 1.8 and 1.9 million files was based on information given to her by  
7 the government contractor. The Government explained that Agent Borden relied  
8 on that information without knowing how that number was calculated.

9 Moreover, the Government correctly states that without access to the defense  
10 discovery database, it is impossible to know why the defense team's review of the  
11 evidence shows substantially less than 1.8 or 1.9 million files. ECF No. 399 at 5.  
12 After the hearing in this matter, the Government submitted a declaration by Ms.  
13 Alexandra McCombs, ECF No. 443. In Ms. McCombs' declaration she explains  
14 the number of files and duplicates that were originally given to her company in  
15 2012 to process. ECF No. 443 at 3-4. Ms. McCombs states that identical files  
16 were removed during "the de-duplication process." ECF No. 443 at 4.

17 The Court cannot determine precisely how many files should have been  
18 disclosed, including identical files. Mr. Smith cannot adequately demonstrate to  
19 this Court, at this stage in the proceedings, and presumably without a side-by-side  
20 comparison of the two discovery databases, that any non-identical files were not

1 disclosed. It may be that the method by which the Government's contractors have  
2 organized and processed the data is different from the defense team's method  
3 which could account for the size difference.

4 What is clear is that Mr. Smith provides no evidence that Defendants have  
5 suffered "substantial prejudice" as a result of this alleged intentional  
6 misrepresentation by the Government. *See Chapman*, 524 F.3d at 1087 (quoting  
7 *United States v. Jacobs*, 855 F.2d 652, 655 (9th Cir. 1988)). Mr. Smith states that  
8 the alleged misrepresentation "has produced a substantial hardship upon the  
9 Defendants," ECF No. 390 at 11, but fails to expound upon that hardship or  
10 provide examples of its effects. Without a showing of substantial prejudice, this  
11 Court cannot dismiss an indictment with prejudice. Therefore, Defendants' motion  
12 to dismiss, ECF No. 390, is denied.

13 Alternatively, Mr. Smith asks this Court to disqualify AUSA Parisi and  
14 potential government witness, Agent Borden, from the trial. ECF No. 390 at 14.  
15 Mr. Smith provides no precedent for such an action by this Court and no grounds  
16 for his proposed remedy other than his allegation that AUSA Parisi lied to the  
17 Court about the number of Google, Inc. files. The Court finds that such a request  
18 is not supported by either legal authority or by the facts and denies Defendant's  
19 motion to disqualify.

1 Mr. Smith further requests, in the alternative, that this Court suppress all of  
2 the data turned over by Google, Inc. pursuant to the Government's search warrant.  
3 ECF No. 390 at 13. The Ninth Circuit has indicated that suppression of evidence  
4 may be an appropriate remedy for prosecutorial misconduct amounting to a Fifth  
5 Amendment due process violation. *See United States v. Rogers*, 751 F.2d 1074,  
6 1078 (9th Cir. 1985). As previously explained, the Court has not found a  
7 constitutional violation and denies Mr. Smith's motion to suppress on that basis.

8 Finally, Mr. Smith wishes this Court to treat his motion as a "formal  
9 complaint" of AUSA Parisi's professional misconduct, and to empanel a Special  
10 Grand Jury to investigate Mr. Smith's allegations that AUSA Parisi committed  
11 fraud, perjury, and conspiracy. ECF No. 390 at 15. The Court may take  
12 disciplinary action against an attorney practicing before this Court if the attorney  
13 "engages in conduct violating applicable Rules of Professional Conduct of the  
14 Washington State Bar, or . . . fails to comply with rules or orders of this Court."  
15 LR 83.3(a). In order to initiate disciplinary proceedings against an attorney, the  
16 Court must find that "reasonable grounds" exist. LR 83.3(b). The Court finds  
17 there is no evidence that AUSA Parisi has violated the Rules of Professional  
18 Conduct or the rules of this Court. Therefore, Mr. Smith's motion, ECF No. 390,  
19 is denied.

1 **B. Sixth Amendment Claim**

2 **1. ECF No. 393: Motion to Dismiss or Alternatively to Disqualify and to**  
3 **Suppress**

4 Mr. Smith urges this Court to dismiss the indictment in this case because  
5 AUSA Parisi had physical custody of the defense discovery hard drive after it was  
6 loaded with the Google, Inc. data and while it contained e-mails subject to  
7 attorney-client privilege, ECF No. 393 at 1, 7. Mr. Smith contends that in doing  
8 so, AUSA Parisi violated Mr. Smith's Sixth Amendment right to counsel. ECF  
9 No. 393 at 3.

10 Mr. Smith points specifically to an e-mail AUSA Parisi sent to the defense  
11 discovery coordinator, Tim McCann, in which he states he received the defense  
12 discovery hard drive and is checking to ensure that all of the discovery is on the  
13 drive. *See* ECF No. 393 Ex. A. Mr. Smith also points to a letter AUSA Parisi  
14 enclosed with the defense discovery hard drive when he mailed it to Mr. McCann,  
15 in which he lists all of the computers, hard drives, and thumb drives from which  
16 discovery was gleaned and from which the data was copied onto the hard drive.  
17 ECF No. 393 Ex. B. This list includes the identifying numbers of the computers,  
18 hard drives, and thumb drives, as well as a brief description of each device  
19 pertaining to the electronic data. ECF No. 393 Ex. B. The description for the files  
20

1 returned by Google, Inc. is identified as “[v]arious mbox files obtained from  
2 Google.” ECF No. 393 Ex. B.

3 In response, the Government argues that the electronic discovery on the  
4 defense discovery hard drive of which AUSA Parisi had physical custody was  
5 unprocessed, raw data. ECF No. 399 at 8-9. The Government notes that the  
6 defense litigation support expert, Orange Technologies, has stated that the raw data  
7 must be processed in order to be legible. ECF No. 399 at 8-9 (citing ECF No. 390  
8 Att. 1). The Government maintains that AUSA Parisi did not view any of the files,  
9 either in their unprocessed form, or in a processed form, and that the Government  
10 has “gone to great lengths to insulate the prosecution team from the contents of any  
11 potentially privileged email.” ECF No. 399 at 9.

12 Mr. Smith argues in reply that the Government’s assertions about the  
13 readability of the data are inaccurate and that the mbox files were readable with  
14 any plain text editor such as Microsoft Word. ECF No. 408 at 3. The affidavit  
15 signed by Brent Westenfelt of Orange Technologies also states that the emails on  
16 the discovery hard drive were MBOX files which were in plain text format,  
17 capable of being “opened in various word processing applications” and read,  
18 without “substantial processing.” ECF No. 418 at 4.

19 The Court concludes that the fact that the files could have been opened with  
20 a word processing application does not mean that Mr. Parisi did open the files. Mr.

1 Parisi could identify the files from the directory without opening the files or having  
2 any access to the contents of the files.

3 In addition, the Court concludes that the allegedly privileged e-mails in this  
4 case are not protected by Mr. Smith's Sixth Amendment right to counsel. The  
5 Sixth Amendment right to counsel attaches only upon the initiation of formal  
6 criminal charges, such as by indictment. *Maine v. Moulton*, 474 U.S. 159, 170  
7 (2985); *United States v. Hayes*, 231 F.3d 663, 674 (9th Cir.2000) ("[Kirby v.  
8 Illinois, 406 U.S. 682 (1972)] forecloses application of the Sixth Amendment to  
9 events before the initiation of adversary criminal proceedings." (quoting *United  
10 States v. Ash*, 413 U.S. 300, 303 n.3 (1973)) (internal quotation marks omitted);  
11 *United States v. SDI Future Health, Inc.*, 464 F.Supp.2d 1027, 1047 (D.Nev. 2006)  
12 (noting that "[t]he Ninth Circuit adheres to th[is] bright line rule"). Being a target  
13 of a criminal investigation is not sufficient. *Hayes*, 231 F.3d at 674. Additionally,  
14 the Sixth Amendment right to counsel is offense-specific. *McNeil v. Wisconsin*,  
15 501 U.S. 171, 175 (1991). It does not apply once for all future prosecutions, but  
16 rather applies only to the offense for which the defendant has been indicted, and  
17 any other offenses that constitute the "same offense" under the *Blockburger* test.  
18 See *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

19 Because the Sixth Amendment right to counsel does not attach until the  
20 initiation of formal criminal charges, there can be no Sixth Amendment violation

1 for intrusions into the attorney-client relationship prior to the indictment. *SDI*  
2 *Future Health, Inc.*, 464 F.Supp.2d at 1048 (holding no Sixth Amendment  
3 violation where the seizure of defendants' allegedly privileged information  
4 predated the indictment); *United States v. Kennedy*, 225 F.3d 1187, 1193–93 (10th  
5 Cir. 2000) (“Government intrusions into pre-indictment attorney-client  
6 relationships do not implicate the Sixth Amendment.”); *United States v. Lin Lyn*  
7 *Trading, Ltd.*, 149 F.3d 1112, 1117 (10th Cir. 1998) (finding that defendant's Sixth  
8 Amendment rights were not implicated where prior to indictment, government  
9 agents seized a notebook containing confidential attorney-client communications);  
10 *United States v. Kingston*, 971 F.2d 481, 491 (10th Cir.1992) (holding that  
11 appellant could not show prejudice under the Sixth Amendment for violation of  
12 attorney-client privilege pre-indictment because “the Sixth Amendment right to  
13 counsel does not attach prior to indictment.”).

14 When the search warrant was issued and the electronic data was seized, no  
15 formal adversary proceedings had been initiated against Defendants. The Google,  
16 Inc. search warrant that produced the allegedly privileged e-mails in this case was  
17 issued on June 30, 2011. Transcript of Motion Hearing at 23, *In re: Search*  
18 *Warrants*, No. 2:11-cv-00340-RMP (E.D. Wash. Feb. 2, 2012), ECF No. 31. Thus,  
19 all of the e-mails that the Government seized were written and read prior to June  
20 30, 2011, or the return of any Grand Jury indictments against Mr. Smith.

1 Following the seizure of the data, the Government continued with its investigation.  
2 It was not until a year and a half later, on January 23, 2013, that a grand jury  
3 returned an indictment for Defendants. ECF No. 1 at 21. Therefore, the Sixth  
4 Amendment right to counsel had not yet attached, and Mr. Smith's Sixth  
5 Amendment rights were not violated by the seizure of those potentially privileged  
6 e-mails.

7 Moreover, the seizure of those e-mails did not become a Sixth Amendment  
8 violation upon the filing of the indictment. *United States v. Lin Lyn Trading, Ltd.*,  
9 149 F.3d 1112, 1117 (10th Cir.1998) (holding that the seizure of attorney-client  
10 communications prior to indictment did not become a Sixth Amendment violation  
11 once the indictment was filed).

12 Mr. Smith directs this Court to *United States v. Danielson*, 325 F.3d 1054,  
13 (9th Cir. 2003). *Danielson*, however, is inapplicable to the facts of this case. First,  
14 the defendant in *Danielson* already had been indicted when the alleged government  
15 intrusion into the attorney-client relationship occurred. *Id.* at 1060. Second, the  
16 defendant had appointed counsel during the period in which the government  
17 intrusion took place. *Id.* at 1059, 1062. The government intrusion was specifically  
18 related to the defendant's trial strategy as he had discussed it with his appointed  
19 counsel. *Id.* at 1062. Additionally, the defendant's counsel was appointed to  
20 represent him in the same trial for which the government improperly learned of

1 defense trial strategy. *Id.* at 1066-67. (“The government’s [intrusion] to obtain  
2 [defendant’s] statements regarding separate offenses for which he had not been  
3 indicted . . . was not an impermissible intrusion into the attorney client privilege  
4 and therefore did not violate his Sixth Amendment rights. . . . The information  
5 sought and obtained . . . however, was not limited to information regarding  
6 separate offenses.”) *Id.* at 1066.

7 The facts in Mr. Smith’s case are directly contrary to those in *Danielson*. In  
8 contrast to *Danielson*, Mr. Smith is proceeding pro se, and although he has had  
9 appointed counsel at the beginning of this case, that appointed counsel was not the  
10 same attorney with whom Mr. Smith was conversing in the e-mails at issue.  
11 Moreover, Mr. Smith had not yet been indicted, nor had any formal adversary  
12 proceedings been initiated against him, when the e-mails were written or seized.  
13 Finally, because the e-mails in question were written at least a full year and a half  
14 prior to the indictment in this case, and with an attorney who never represented Mr.  
15 Smith in this matter, the contents of the e-mails cannot plausibly pertain to Mr.  
16 Smith’s trial strategy in this case.

17 *Danielson* sets out a framework of analysis upon an allegation that a  
18 defendant’s Sixth Amendment right to counsel has been violated by a government  
19  
20

1 intrusion into the attorney client privilege.<sup>3</sup> However, because the Sixth  
2 Amendment does not apply to the e-mails, the search and seizure of those e-mails,  
3 or any possible government intrusions into those e-mails, this Court need not  
4 determine whether AUSA Parisi did in fact view those e-mails, or whether Mr.  
5 Smith has suffered prejudice as a result.<sup>4</sup>

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6 <sup>3</sup> The Ninth Circuit has held that a defendant who argues that the government  
7 violated his Sixth Amendment right to counsel by obtaining privileged information  
8 about the defendant's trial strategy must make a "prima facie showing of  
9 prejudice." *Danielson*, 325 F.3d at 1071 (discussing *United States v. Mastroianni*,  
10 749 F.2d 900, 907-08 (1st Cir. 1984)). Establishing a prima facie case of prejudice  
11 requires showing that a government informant "acted affirmatively to intrude into  
12 the attorney-client relationship and thereby to obtain the privileged information."  
13 *Id.* Once a prima facie case is established, "the burden shifts to the government to  
14 show that there has been . . . no prejudice to the defendant[] as a result of these  
15 communications." *Id.* (quoting *Mastroianni*, 749 F.2d at 908) (alteration in  
16 *Danielson*). The government bears a "heavy burden" in showing lack of prejudice  
17 once the defendant has made out a prima facie case. *Id.*

18 <sup>4</sup> The Court also notes that the debate regarding whether the e-mails require  
19 minimal processing, or some processing, or substantial processing, is just parsing  
20 words. When asked by the Court, Mr. Smith acknowledged at the hearing that

1 Finally, although Mr. Smith did not raise a Fifth Amendment claim  
2 regarding the alleged government intrusion into his attorney-client privilege, the  
3 Court notes for Mr. Smith's benefit that the facts as alleged by Mr. Smith do not  
4 rise to the level of "flagrant prosecutorial misconduct," as is required in order to  
5 grant dismissal under the Fifth Amendment. *Chapman*, 524 F.3d at 1085 (quoting  
6 *United States v. Simpson*, 927 F.2d 1088, 1091 (9th Cir 1991)) (internal quotation  
7 marks omitted) *abrogated on other grounds by United States v. W.R. Grace*, 526  
8 F.3d 499, 511 n.9 (9th Cir. 2008).

9       Although AUSA Parisi admits to having had physical custody of the defense  
10 discovery drive containing the e-mails in question, ECF No. 399 at 8-9, there is no  
11 evidence that AUSA Parisi obtained custody of the hard drive for any reason other  
12 than to ensure that all of the discovery files were included on the drive. See ECF  
13 No. 393 Ex. A. AUSA Parisi assigned another attorney, who is not part of the  
14 litigation team, to review the Google, Inc. data for any e-mails that may be  
15 privileged. Considering the age of the e-mails, the fact that the attorney included  
16 on the e-mails is not, and never has been, Mr. Smith's attorney of representation in

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17 even opening one of the MBOX files in a plain text reader constitutes "some  
18 processing," though it may be minimal. There is no requirement that the files  
19 require any processing at all. Under *Danielson*, the mere possession of the files by  
20 the Government shifts the burden to the Government to prove non-use.

1 this case, the improbability that the e-mails contain any trial strategy as it pertains  
2 to this case, and the utter lack of evidence that AUSA Parisi even viewed the files,  
3 let alone obtained some useful information from them that will inform the  
4 Government's trial strategy, AUSA Parisi's conduct does not rise to the level of  
5 "flagrant prosecutorial misconduct." For similar reasons, there is no evidence that  
6 Mr. Smith has suffered substantial prejudice from AUSA Parisi's temporary  
7 possession of the hard drive.

8 This Court also denies Mr. Smith's alternative requests that AUSA Parisi be  
9 disqualified from this case, or that this Court suppress the Google, Inc. discovery,  
10 for the same reasons noted earlier with respect to Mr. Smith's other Motion to  
11 Dismiss, ECF No. 390. Therefore, Defendants' motion, ECF No. 393, is denied.

12 Accordingly, **IT IS HEREBY ORDERED:**

- 13 1. Defendants' Motion for Dismissal or in the Alternate an Order  
14 Compelling Production and Granting a Continuance, **ECF No. 389**, is  
15 **DENIED in part and RESERVED in part**;
- 16 2. Defendants' Verified Report of Felony Violations Pursuant to 18 U.S.C.  
17 § 4; Professional Misconduct (28 U.S.C. § 530B), Due Process  
18 Violations; and Motion for Relief, **ECF No. 390**, is **DENIED**; and

19 / / /

20 / / /

3. Defendants' Motion to Dismiss Case or Disqualify Counsel for Plaintiff, **ECF NO. 393**, is **DENIED**.

The District Court Clerk is directed to enter this Order and to provide copies to counsel and to *pro se* Defendant Louis Daniel Smith.

**DATED** this 31st day of October 2014.

*s/ Rosanna Malouf Peterson*  
**ROSANNA MALOUF PETERSON**  
Chief United States District Court Judge